STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC, for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of a 5-wind turbine electric generation facility, with associated electric and interconnection facilities, on Georgia Mountain in the Towns of Milton and Georgia, Vermont, to be known as the "Georgia Mountain Community Wind Project"	)))))))

Order entered: 9/1/2011

ORDER DENYING MOTION FOR RECONSIDERATION

Introduction

On June 11, 2010, the Public Service Board ("Board") issued an Order and Certificate of Public Good ("CPG") to Georgia Mountain Community Wind, LLC ("GMCW") in this docket, which included the following condition:

> GMCW shall incorporate into the proposed Project design an appropriate set-back distance from adjacent property lines. The Board will conduct additional proceedings to determine an appropriate set-back distance from the turbines to the adjacent property lines.

On May 31, 2011, the Board issued an Order regarding setback requirements. In the May 31 Order, the Board determined that the appropriate set-back distance for GMCW's proposed Project was 55 meters.

On June 14, 2011, the "Landowner Intervenors"[1] filed a Motion for Reconsideration in this docket regarding the Board's May 31 Order.

In this Order, we deny the Landowner Intervenors' Motion for Reconsideration.

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1. Daniel and Tina Fitzgerald, Kenneth and Virginia Mongeon, Kevin and Cindy Cook, George A. and Kenneth N. Wimble, Scott and Melodie McLane, Matthew and Kimberly Parisi, and Jane and Heidi FitzGerald (collectively, "Landowner Intervenors").

Landowner Intervenors' Motion for Reconsideration

The Landowner Intervenors request that the Board reconsider five aspects of its decision and amend the May 31 Order to provide a setback of at least 1.1 times the turbine height. The Landowner Intervenors request that the Board consider the evidence provided by Scott McLane and the FitzGeralds rather than relying on the risk analysis presented by GMCW's witness Marc LeBlanc. In addition, the Landowner Intervenors assert that the burden of proof is on GMCW, not the FitzGeralds, to provide evidence that there is no significant use of the adjoining property. The Landowner Intervenors also assert that the 55-meter setback approved by the Board does not protect the public health and safety from turbine failure and collapse, even with assurances that the turbines will meet certification requirements. Further, the Landowner Intervenors assert that whether or not a petitioner can meet a setback should not determine whether a certain setback distance is reasonable. Finally, the Landowner Intervenors assert that a reasonable setback should protect the development rights of adjacent property owners.

Petitioner's Response

On July 5, 2011, GMCW filed a response to the Motion for Reconsideration. GMCW contends that the Landowner Intervenors' "arguments must be rejected because they are not based upon a change in the controlling law, do not rely on evidence previously unavailable, and fail to identify any clear error of law or manifest injustice."

No other party filed a response to the motion.

Discussion

Under a motion for reconsideration, the Board "may reconsider issues previously before it and generally may examine the correctness of the judgment itself."[2] Upon reexamining our

2. *In re Robinson/Keir P'ship*, 154 Vt. 50, 54 (1990) (citation omitted); *see also Petition for Investigation of Verizon Wireless*, Docket No. 6651, Order of 10/6/06 at 2. As stated in *Osborn v. Osborn*, 147 Vt. 432, 433 (1986), Vermont Rule of Civil Procedure 59(e),

> codified the trial court's inherent power to open and correct, modify or vacate its judgments. A motion under Rule 59(e) suspends the finality of the judgment, and allows the trial court to revise its initial judgment if necessary 'to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party.' The motion [under Rule 59(e)] provides a party with an opportunity to take advantage of the court's

May 31 Order, we conclude that our decision was correct and deny the Landowner Intervenors' request that we amend the Order to provide a setback of at least 1.1 times the turbine height.

First, the Landowner Intervenors' assertions are incorrect in asserting that the Board did not consider the evidence provided by Mr. McLane and the FitzGeralds and instead wrongly relied on Mr. LeBlanc's risk analysis. In 30 V.S.A. § 248 proceedings, the Board's role is to determine whether a petitioner satisfies the substantive criteria of Section 248. The Order at issue here specifically addressed whether the Project, with a 55-meter setback, would have an undue adverse effect on public health and safety. In making its determinations, the Board examines all of the evidence presented by the parties and decides which evidence is more persuasive. In this proceeding, the Board did consider the evidence provided by Mr. McLane and the FitzGeralds, but was persuaded by the evidence presented by GMCW that the 55-meter setback would not present an undue risk to public health and safety.

In addition, the Landowner Intervenors' assertion regarding the burden of proof is misplaced. A petitioner has the burden of proof to provide sufficient evidence to satisfy the substantive criteria of Section 248. A petitioner's burden of proof involves two concepts—the burden of production and the burden of persuasion.[3] Once a petitioner carries its initial burden of production by presenting credible evidence for each of the substantive criteria of Section 248, it could receive a favorable decision from the Board. If a petitioner has thus carried its burden, the burden of production then shifts to the non-petitioner party to present evidence which calls into question a petitioner's ability to satisfy a substantive criterion of Section 248.[4] In the end, it is the Board's task to make a determination for each criterion by weighing the evidence presented

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power to correct a judgment in order to avoid an appeal and its attendant delay. (Citations omitted.)

V.R.C.P. 59(e) is applicable to Board proceedings pursuant to Board Rule 2.105.

3. Under its burden of production, a petitioner has a duty to introduce enough evidence to allow the Board to determine whether a proposed project satisfies each of the substantive criteria of Section 248. Under its burden of persuasion, a petitioner has a duty to convince the Board to view the facts in a way that favors the petitioner. *See* Blacks Law Dictionary (9th ed. 2009).

4. While the burden of persuasion remains with the petitioner, once the petitioner has carried its initial burden of production, then the non-petitioner parties must present evidence showing that the petitioner does not meet the Section 248 criterion at issue.

by the petitioner and any non-petitioners. In this docket, GMCW presented evidence that there were "no residences or public roads within one-half mile of the proposed turbines" and we determined that there was "insufficient evidence to indicate that the area sees significant use" for recreational purposes.[5] Mrs. J. FitzGerald's testimony stated that it was "hard to say" how many family members used the land and that there was "no accounting on how many people" use the land for all-terrain vehicle recreation.[6] Therefore, based on the evidence before us, we could not conclude that the adjoining property was used in a way that would create undue adverse effect on public health and safety if a 55-meter setback were imposed.[7]

We also disagree with the Landowner Intervenors' assertion that the 55-meter setback approved by the Board does not protect the public health and safety from turbine failure and collapse, even with assurances that the turbines will meet certification requirements. GMCW presented sufficient evidence that the risk of blade throw and tower collapse was remote and that with adherence to the IEC 61400-1 (International Electrotechnical Commission) certification requirements, including periodic testing of the turbines and blades, and with the implementation of appropriate winter operating protocols, the risk was mitigated to a point such that it did not represent "a realistic threat to the public."[8]

We agree with the Landowners Intervenors' assertion that whether or not a petitioner can meet a certain setback should not determine whether that setback distance is reasonable. However, in this proceeding, we did not base our determination on whether the petitioner could meet a larger setback. Instead, our determination was based on what the record evidence demonstrated as to the set-back distance that would be sufficient to prevent an undue adverse effect on public health and safety. Although the FitzGeralds contended that a reasonable setback should be based on scientific analysis and "on what an average person would consider to be fair

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5. *Petition of GMCW*, Docket 7508, Order of 5/31/11 at 8.

6. Tr. 3/10/11 at 159-162 (FitzGerald).

7. Furthermore, as we have observed in prior cases, a petitioner is not obligated to "prove a negative." *See Petition of North Country Elec. Co.*, Docket 4656, Order of 2/8/85 ("It is a classic example of having to prove a negative – a virtually impossible task."); *In re Allied Power and Light Comp. et al.*, Docket 4812, Order of 12/11/84 ("to ask a contending party to prove a negative is to ask the impossible.").

8. Docket 7508, Order of 5/31/11 at 3.

and appropriate,"[9] we did not find the evidence presented by the non-petitioner parties sufficient to rebut GMCW's evidence that the proposed 55-meter setback would not present an undue risk to public health and safety.

Finally, we disagree with the Landowner Intervenors' assertion that a reasonable setback should necessarily protect the development rights of adjacent property owners. As we stated in our May 31 Order,

> In its *Bandel* decision, the Vermont Supreme Court stated that in a Section 248 proceeding, 'The sole issue is the determination of whether or not under the criteria set forth in the statute the proposal for which a certificate is sought advances the public interest.' The Court continued: 'Individual property rights not being at issue, they are not a basis for any special recognition of the property owners, nor do they support any special consideration for their protection in these proceedings.' Any development will have some impact on nearby landowners, and this project is no exception. Furthermore, given the State of Vermont's policy supporting renewable energy and the benefits that will be provided by the Project as detailed in our June 6 Order, we have determined that the wind turbines proposed by GMCW promote the public good.[10]

There has been no change in the controlling law on this issue since our May 31 Order, and the Landowner Intervenors have failed to identify any error in our decision on this topic. Therefore, we see no reason to reconsider our decision in this regard.

SO ORDERED.

9. Docket 7508, Order of 5/31/11 at 5.

10. Docket 7508, Order of 5/31/11 at 9-10 (citations omitted).

Dated at Montpelier, Vermont, this 1st day of September, 2011.

s/James Volz	)
	) PUBLIC SERVICE
	)
s/David C. Coen	) BOARD
	)
	) OF VERMONT
s/John D. Burke	)

OFFICE OF THE CLERK

FILED: September 1, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)